

1 wrong with it.

2 JUDGE SIPPEL: What is
3 anticompetitive about it?

4 MR. SCHMIDT: What is
5 anticompetitive is that they are making that
6 decision because of ownership. The reason
7 they are doing that, as I understood Your
8 Honor's hypothetical, they are doing that not
9 because of the value that Versus and Golf
10 Channel bring to the cable business but
11 because they own those channels and get value
12 out of treating them better. That is
13 anticompetitive.

14 JUDGE SIPPEL: It is all part of
15 the ripple effect.

16 MR. SCHMIDT: Well it is and it
17 becomes anticompetitive when you have a
18 channel like the Tennis Channel and they
19 continue to give those benefits to Versus and
20 Golf Channel.

21 JUDGE SIPPEL: I haven't reached
22 that point in the hypothetical yet. I'm just

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1 talking about before Tennis Channel appears on
2 the scene. This is what they do and they do
3 it because they want to get the benefit of
4 the, broadly stated, the ripple effect. You
5 can parse it different ways but basically that
6 is what they want to get. This is going to
7 get us to the most people in the earliest
8 possible time at what would be a favorable
9 cost to us.

10 And there is a provision someplace
11 in that statutory act of genius that says that
12 they can compete.

13 MR. SCHMIDT: Absolutely.

14 JUDGE SIPPEL: They can compete
15 aggressively and they rely on the market.
16 They can rely on the market. You are right.
17 They can't discriminate and I'm not trying to
18 change that part of it at all. But I'm trying
19 to get an understanding of this. What am I
20 missing? What am I missing?

21 MR. SCHMIDT: Well I think the key
22 question and the provision Your Honor cited is

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1 a very important provision because we have a
2 very different reading of that provision about
3 relying on competitive forces than Comcast
4 does. We understand that provision to be
5 saying Congress wants to rely on competitive
6 forces. Section 616 kicks in when the
7 competitive forces don't work the way they
8 should because of ownership and that is what
9 it all comes back to.

10 If they are applying a different
11 test, even if it is a different test in 1995
12 than they applied to us in 2005, and they
13 continue to apply that different test moving
14 forward, right up through 2005, after 2005
15 when they launched new channels that they
16 acquire equity in, that is discrimination.
17 That is different treatment of similarly
18 situated channels based on ownership. That is
19 what Section 616 was designed to address.

20 Congress recognized that there is
21 a competitive motivation for an individual
22 company to say we own this channel. We will

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1 give them benefits we don't give channels that
2 we don't own because that helps us. But
3 Congress also said that is anticompetitive
4 overall and that is where the discrimination
5 comes in.

6 And in Your Honor's hypothetical,
7 the discrimination is if they are making a
8 decision based on ownership. Now, there may
9 not be claim until Tennis Channel comes along
10 because obviously it doesn't exist. But when
11 Tennis Channel comes along and they apply a
12 different test to Tennis Channel, than they
13 did to their own channel, they help out their
14 own channel, and even after Tennis Channel is
15 on the scene and their channel continues to
16 struggle, that was Mr. Shell's testimony, they
17 still apply a different test to their channel
18 than they do to Tennis Channel. That is the
19 essence of discrimination.

20 JUDGE SIPPEL: The act of
21 discrimination doesn't occur until Tennis
22 Channel arrives on the scene and knocks on the

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1 door and says we want to get on your system.

2 MR. SCHMIDT: Sure.

3 JUDGE SIPPEL: But before that,
4 how can there be, even if they were doing all
5 the things that you are saying but there is no
6 harm to a competitor because there is no
7 competitor out there that is looking to get on
8 their system.

9 MR. SCHMIDT: Absolutely.

10 JUDGE SIPPEL: There can't be a
11 violation. They can't be violating the law at
12 that point.

13 MR. SCHMIDT: Until Tennis Channel
14 comes along, there is no victim. When Tennis
15 Channel does come along --

16 JUDGE SIPPEL: You need a victim
17 to have a violation. Right?

18 MR. SCHMIDT: Yes, absolutely.

19 JUDGE SIPPEL: Okay.

20 MR. SCHMIDT: And Tennis Channel
21 does come along and they apply a totally
22 different standard in 2005 or 2009 than they

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1 applied in 1995 to their own channels. That
2 is the violation.

3 JUDGE SIPPEL: Okay. Now, if it
4 is that bad, that blatant, why haven't they
5 been sued before 2010 by anybody? I'm not
6 saying by you but by anybody.

7 MR. SCHMIDT: They have been sued
8 repeatedly. They are the most sued company
9 under Section 616 that there is.

10 JUDGE SIPPEL: Under 616?

11 MR. SCHMIDT: Yes. I don't know
12 that there is another company that is subject
13 to more Section 616 lawsuits.

14 JUDGE SIPPEL: When was the first
15 one brought?

16 MR. SCHMIDT: The ones I know of -
17 - And Mr. Carroll would know this better than
18 me. I think he has been in every one of them.
19 But the ones I know of are the *NFL*, the *MASN*
20 case, and the *Wealth TV* case.

21 JUDGE SIPPEL: Well those are
22 relatively recent, aren't they?

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1 MR. SCHMIDT: Those are relatively
2 recent. What the FCC, I think, has recognized
3 is that there is a real cost to bringing these
4 lawsuits and there is a real challenge to
5 bringing these lawsuits. That doesn't change
6 -- I don't think Comcast is in a position to
7 say our record is so clean that you have a
8 higher hurdle to show in this case in order to
9 prove discrimination. We think the record
10 shows, actually, the opposite.

11 And again, I return to the simple
12 starkest fact, that none of their channels are
13 on the sports tier. Our channel is and we
14 will never get off the sports tier.

15 JUDGE SIPPEL: Okay, now I
16 understand what you are saying and I know what
17 the case is now. And I agree that I have kind
18 of moved you off the track here a little bit.

19 Okay, let's keep going. What is
20 your next point?

21 MR. SCHMIDT: The next point I
22 want to make very briefly, and I will be very

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1 brief, is why the different treatment is
2 discrimination. And the single best point on
3 that subject is the fact that the channels are
4 similarly situated but get such radically
5 different treatment, strikingly different
6 treatment. That is the essence of
7 discrimination. And Dr. Singer testified
8 convincingly to that fact. Even Mr. Orszag
9 reinforced that fact. Mr. Orszag acknowledged
10 that when he looked out at the marketplace, to
11 look at how other channels carry, other
12 carriers, other distributors carry Versus and
13 Golf Channel, as opposed to how Comcast
14 carries them. Comcast carries its channels at
15 a higher level than other distributors do.
16 That is discrimination on the basis of
17 affiliation.

18 Dr. Singer also looked at how
19 Comcast carries Tennis Channel. And the fact,
20 as I alluded to earlier that where Comcast is
21 subject to competition, in markets where it is
22 subject to more competition, which is the

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1 minority where it has very heavy competition,
2 in markets where it is subject to more
3 competition, it carries Tennis Challenge at a
4 higher level. Where it is subject to less
5 competition, it carries it at a lower channel.

6 Dr. Singer testified about how
7 that is evidence of discrimination. And
8 again, Mr. Orszag reinforced that by
9 acknowledging that when you look at all other
10 carriers, not just cable companies but all
11 other carriers, particularly the ones that
12 Comcast does compete with, the satellite
13 companies and the telephone companies, when
14 you look at all other carriers, you see that
15 Comcast carries Tennis Channel at a much lower
16 level than the marketplace does. That is
17 evidence, we think compelling evidence of
18 discrimination on the basis of non-
19 affiliation.

20 JUDGE SIPPEL: And who else in the
21 market is carrying them at a higher level?

22 MR. SCHMIDT: Is carrying Tennis

1 Channel at a higher level?

2 JUDGE SIPPEL: Yes. Well, that is
3 a bad way to put it. At a more broadly
4 distributed level.

5 MR. SCHMIDT: Comcast carries
6 Tennis Channel at 12.9 percent. The NCTC
7 cooperative of cable channels carries it at
8 22.1 percent; AT&T 23; Dish nearly 27; Cox
9 nearly 34; Verizon nearly 41; and DirecTV just
10 over 63.

11 So all of those, which includes
12 Comcast's main competitors, DirecTV, Verizon,
13 Cox, Dish, AT&T -- I'm sorry, I included Cox
14 on that list. Cox is not a direct competitor.
15 The other ones are direct competitors. All of
16 those carry Tennis Channel at levels higher
17 than what Comcast carries Tennis Channel at.

18 So that is evidence on both sides
19 of the equation. They carry themselves
20 better. Discrimination on the basis of
21 affiliation. They carry us worse.
22 Discrimination on the basis of non-

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1 affiliation.

2 And then we have the motive here
3 that Your Honor talked about where they enjoy
4 a benefit from carrying themselves more
5 broadly in terms of the ripple effect Your
6 Honor talked about in the marketplace. Mr.
7 Rigdon acknowledged that in his testimony and
8 Comcast's legal arguments in this case make
9 that very point. Comcast spent a lot of time
10 in this litigation saying ignore DirecTV's
11 carriage of Tennis Channel because they own a
12 minority interest in Tennis Channel. Ignore
13 Dish's carriage of Tennis Channel because they
14 own a minority interest in Tennis Channel.

15 The very premise for that argument
16 is that ownership matters. And it does in
17 Comcast's view. If you are talking about a
18 minority interest influencing carriage
19 decisions, then the 100 percent interest
20 certainly influences carriage decisions and we
21 see that in the carriage patterns that even
22 Mr. Orszag acknowledged.

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1 Comcast's witnesses admitted, the
2 folks on the cable side, Mr. Bond and Ms.
3 Gaiski, they admitted that they are supposed
4 to have an arm's length relationship with the
5 channels that they own. But that is not what
6 the evidence showed that they actually do.
7 They take steps to help their channels that
8 they don't take for channels that they don't
9 own. And the most striking --

10 JUDGE SIPPEL: Does anybody in the
11 real world believe that there is an arm's
12 length relationship between wholly owned
13 subsidiaries? I mean that is an *Alice in*
14 *Wonderland* theory. Isn't it?

15 MR. SCHMIDT: We think that is
16 right but that is what they testified to.

17 JUDGE SIPPEL: Well, I can't say
18 that they are. I'm just saying, this is just
19 -- I never ran a company. So you might say I
20 don't know what I'm talking about but I am
21 curious.

22 MR. SCHMIDT: The point we would

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1 say on that, Your Honor, is that there is
2 supposed to be. That doesn't mean they can't
3 talk. That doesn't mean that they have to be
4 a thousand percent arm's length but they are
5 supposed to treat the channels they don't own
6 comparably to the channels they do own.

7 JUDGE SIPPEL: Okay. I agree with
8 that statement.

9 MR. SCHMIDT: And that is where
10 the arm's length breaks down with Comcast.

11 JUDGE SIPPEL: Okay. Now, but
12 isn't it true -- Is it true that the Golf
13 Channel and Versus are carried more broadly by
14 other carriers than they carry the Tennis
15 Channel themselves? In other words, they get
16 better treatment out there, they being GC and
17 Versus, than does Tennis Channel?

18 MR. SCHMIDT: Yes, that is true.

19 JUDGE SIPPEL: This would be --
20 Okay. Then would that be evidence as showing
21 that the Golf Channel and Versus have good
22 solid programming that others want?

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1 MR. SCHMIDT: We don't dispute
2 that they have good solid programming. The
3 question is, are they different from us such
4 that Comcast can justify treating them
5 differently from us. We think the fact that
6 they get broader carriage in the marketplace
7 speaks to this ripple effect that Your Honor
8 was pointing to, whereby preferencing its own
9 channels, it is able to get them a better
10 position in the marketplace.

11 But at the end of the day, the key
12 inquiry is how does Comcast treat itself
13 versus how it treats us. And if we are right,
14 that we have established substantial
15 similarity and we look to Comcast's own
16 documents and own admissions in doing that, we
17 are certainly right as to the wildly different
18 treatment that they enjoy. Mr. Orszag
19 concedes they treat themselves better than the
20 market and they treat us worse than the
21 market. All of that speaks to discrimination.

22 The key question in discrimination

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1 is do they apply the same standards to us that
2 they do to themselves. And the evidence
3 showed that they didn't. We even have in this
4 case something that you don't have in most
5 cases, which is a direct motive to
6 discriminate, in terms of Comcast having
7 attempted in the past and right up through the
8 time of the hearing in terms of Wimbledon
9 rights, to secure tennis content for its
10 channels. We know at various times that it
11 has looked to getting tennis content for
12 Versus, tennis content the Tennis Channel is
13 indisputably competing for. And we know that
14 when Comcast has looked at getting those
15 rights, it has recognized in its documents
16 that Tennis Channel is a natural competitor
17 for those rights, a natural fit, I think is
18 the word that they use in their documents.

19 JUDGE SIPPEL: If I understand it,
20 ESPN just signed on a big deal with Wimbledon
21 for like from now until forever.

22 MR. SCHMIDT: That is correct as

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1 to some of the rights for Wimbledon. As we
2 understand it --

3 JUDGE SIPPEL: Do you think -- I'm
4 sorry. Go ahead. Go ahead, finish your
5 statement.

6 Do you really think that you have
7 got a chance now, that Tennis Channel has a
8 chance at Wimbledon?

9 MR. SCHMIDT: Yes, absolutely.
10 But the fact that we are diminished in our
11 ability to compete with a network like ESPN
12 for those rights, speaks to the impaired
13 carriage that we received from Comcast. That
14 is part of the harm that we have experienced.

15 JUDGE SIPPEL: You are being
16 debilitated in your competitive efforts.

17 MR. SCHMIDT: Yes.

18 JUDGE SIPPEL: Okay. I see your
19 argument. Okay.

20 MR. SCHMIDT: So there is even a
21 direct motive to discriminate here in terms of
22 the desire to get the tennis rights. We don't

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1 think the Court needs to go that far because
2 of the other evidence of both a motive to
3 discriminate and acting on that motive. But
4 the fact that they have actually sought to
5 acquire the same tennis programming for their
6 channels, that they have looked at Tennis
7 Channel as a competitive threat in acquiring
8 that program and that they have recognized in
9 their documents that the biggest challenge
10 Tennis Challenge faces is its limited
11 distribution, distribution that they
12 themselves say, based on their carriage of
13 Tennis Channel on the sports tier deprives
14 Tennis Channel of any value, that shows a
15 direct motive that they have to discriminate
16 in this case.

17 JUDGE SIPPEL: Now supposing they
18 say I don't know whether the evidence exists -
19 - I will double check the record on this
20 myself. But suppose they say, they make this
21 argument. Say look, we would like to
22 accommodate. We would like to bring you down

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1 and put you in a better spot but we have done
2 a business analysis and although your stuff is
3 good, it is not that good to justify paying
4 all those extra licensing fees that are going
5 to run into millions and millions of dollars.
6 What would be your answer to that, as a
7 business argument?

8 MR. SCHMIDT: Well on the facts of
9 our case, we don't think they could make that
10 business case because we have shown that the
11 channels are similar, are substantially
12 similar in terms of their value.

13 JUDGE SIPPEL: And that is the end
14 of the argument, basically?

15 MR. SCHMIDT: And that we don't
16 think there has been evidence presented that
17 we only get halfway there and not all the way
18 there. We think we get all the way there
19 because of the evidence we have shown of
20 substantial similarity where the only real
21 difference between us is that we cost a heck
22 of a lot less money than their channels.

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1 JUDGE SIPPEL: When you say you
2 cost less money, to who?

3 MR. SCHMIDT: Less money to
4 Comcast. If Comcast carried us at the same
5 levels that it carried Versus and Golf
6 Channel, it would be paying us half the amount
7 that it chooses to pay, that it requires every
8 one of its systems without a choice to pay for
9 Golf Channel and Versus. That, in our view is
10 the single striking difference between our
11 channel and their channels and it cuts in our
12 favor.

13 JUDGE SIPPEL: Okay, well let's
14 look at it. So to you that is very important.

15 If my understanding is right then,
16 it is Versus and Golf Channel are going to be
17 paying Comcast rights to be sold on that tier,
18 right or to be offered on that tier. That is
19 going to cost more than Tennis Channel would
20 cost if Tennis Channel got down there?

21 MR. SCHMIDT: Yes, Comcast pays
22 twice as much to Versus to carry it at broad

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1 distribution as it would pay Tennis Channel,
2 if it brought it up to that level.

3 JUDGE SIPPEL: How do you know
4 that?

5 MR. SCHMIDT: We know that from
6 the rates in the case and from the testimony.

7 JUDGE SIPPEL: Would they up that
8 rate? I mean, wouldn't they want -- If you
9 want comparable treatment, parity if you will,
10 wouldn't they want them to assess you the same
11 price as the other two? Couldn't they justify
12 that legally? We are just charging what the
13 other guy is charging.

14 MR. SCHMIDT: It is the other way
15 around. They are paying -- I don't have the
16 numbers in front of me. I think it is -- If
17 one of you guys would pass me the numbers.

18 JUDGE SIPPEL: Well you don't need
19 exact numbers.

20 MR. SCHMIDT: But they are paying
21 themselves twice as much. So when they bring
22 us up, they are still paying us half the

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1 amount per subscriber that they are paying
2 themselves.

3 JUDGE SIPPEL: But if they -- Oh,
4 they are paying you.

5 MR. SCHMIDT: Half as much.

6 JUDGE SIPPEL: Oh, I see.

7 MR. SCHMIDT: Yes.

8 JUDGE SIPPEL: Okay. But what
9 about your paying them to be on that -- You
10 are being assessed a fee also to be carried by
11 Comcast.

12 MR. SCHMIDT: No.

13 JUDGE SIPPEL: You don't pay
14 anything?

15 MR. SCHMIDT: No.

16 JUDGE SIPPEL: You don't pay
17 anything?

18 MR. SCHMIDT: No. Comcast doesn't
19 charge us a fee and they don't charge their
20 channels a fee.

21 JUDGE SIPPEL: Okay.

22 MR. SCHMIDT: In the past there

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1 has been talk about how channels have paid
2 launch support --

3 JUDGE SIPPEL: Yes.

4 MR. SCHMIDT: -- to get launched.
5 And that might be what Your Honor is thinking
6 of.

7 JUDGE SIPPEL: I probably have it
8 confused with something else.

9 MR. SCHMIDT: The Golf Channel and
10 Versus have paid that in the past. The Tennis
11 Channel gave that to Comcast in the past. It
12 gave them 40 months of free carriage in the
13 past. So there was 40 months where Comcast
14 didn't have to pay a thing to Tennis Channel,
15 where Tennis Channel paid that to get the
16 coverage that it got.

17 My point is --

18 JUDGE SIPPEL: I get these fliers
19 in the mail where they are making me that
20 deal, too. I mean, not necessarily any
21 company here but I mean in general in the
22 industry. I get them all the time.

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1 MR. SCHMIDT: Yes. My point here
2 is for all the talk about cost, and there has
3 been a lot of talk about cost in this case, in
4 many ways, that is what Comcast's case depends
5 on.

6 And let me turn to my discussion
7 of Comcast defenses because they prove the
8 discrimination, in our view. And the single
9 biggest way that they prove the discrimination
10 is those tests only apply to Tennis Channel.
11 They don't apply to the Comcast channels and
12 cost is the single best example of that.

13 JUDGE SIPPEL: Well look, we are
14 at 11:00 now.

15 MR. SCHMIDT: Yes, I don't intend
16 to -- I've run over. I didn't intend to run
17 over.

18 JUDGE SIPPEL: Well, I have pushed
19 you over. Did you want to take a break before
20 you got into your side of it?

21 MR. CARROLL: I don't need to --

22 JUDGE SIPPEL: Okay.

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1 MR. CARROLL: -- if you don't.
2 But I defer to you.

3 JUDGE SIPPEL: No, I don't. No,
4 I'm fine. Is the reporter -- are you okay?

5 COURT REPORTER: I'm good.

6 JUDGE SIPPEL: Okay. Watch out
7 with that air conditioning.

8 All right, I'm going ask you to
9 quickly, just quickly hit that point.

10 MR. SCHMIDT: The idea is,
11 basically, when you look at every test Comcast
12 has offered whether it is cost, whether it is
13 this survey of the field that Ms. Gaiski
14 talked about, that she admitted was a
15 litigation-driven survey of the field, she
16 talked to the lawyers, she wrote work product
17 on the document, when you look at any one of
18 those tests, they are not applied fairly to
19 Tennis Channel, and you see that on the facts
20 of those tests, but they are never applied to
21 Versus and Golf Channel.

22 So we cost too much. It would

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1 cost too much to give us extra carriage but
2 they cost twice as much for that same carriage
3 and there is no evidence in the record that
4 that cost was ever considered.

5 We are subject to a field test.
6 Their channels, there is no evidence in the
7 record that they have ever been subject to a
8 field test. And you can go right down the
9 line of Comcast defenses and you see the
10 thing. There is a test applied to Tennis
11 Channel. Sometimes there is a test that their
12 fact witnesses say we never looked at that but
13 there is a test applied to Tennis Channel that
14 was never applied to Comcast's own channels,
15 whether from the time they launched, from the
16 time they were struggling while Tennis Channel
17 existed, right up through the present day.
18 That is the essence of discrimination.

19 JUDGE SIPPEL: Well if they
20 brought channels on historically like they
21 brought on The Golf and the Versus, I mean,
22 they have lived with these projects, if you

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